IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1149

LOUIS EPSTEIN,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Louis Epstein respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered on the 26th day of March, 1946 (R. 494), which affirmed the judgment of the United States District Court for the Southern District of New York, entered on the 29th day of December, 1944 (R. 463), convicting the petitioner of using the mails in violation of Section 215 of the Criminal Code, 18 U. S. C. A. § 338 (R. 2, *et seq.*).

The indictment named the petitioner and three others, namely: Wilfred E. Cohen, Harry Sussman and Sam Elkin (R. 2). Cohen and Sussman pleaded guilty to the indictment.

Elkin was tried separately, convicted and died before sentence.

The petitioner was tried before Hon. Mortimer W. Byers, without a jury (R. 17). He was sentenced to prison for a year and a day (R. 463).

Opinion Below

The opinion of the District Court is not reported; it appears at page 439 of the Record. The opinion of the Circuit Court of Appeals is not yet reported; it is reported at page 483 of the Record.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on March 26, 1946. Jurisdiction to issue the writ is found in the provisions of Section 240(a) of the Judicial Code, as amended, by the Act of February 13, 1925; 28 U. S. C. A. § 347(a), as modified pursuant to Act of March 8, 1934, 18 U. S. C. A. § 688, by Rule 11, of Rules of Criminal Procedure after plea of guilty, verdict or finding of guilt.

Questions Presented

1. Whether there is evidence to sustain the petitioner's conviction of using the mails in violation of § 215 of the Criminal Code; 18 U. S. C. A. § 338.

2. Whether the undisputed and uncontradicted evidence does not establish that the letters were mailed in furtherance and in execution of a scheme to defraud, of which the petitioner had no knowledge and to which he was not a party.

Statutes Involved

Section 215 of the Criminal Code, 18 U. S. C. A. § 338 is set forth in the appendix to this petition.

Statement

There were two separate, distinct and independent schemes. The participants in one were the petitioner, Cohen and Sussman. The indictment does not charge that the mails were used in execution and furtherance of that scheme.

The participants in the other scheme were Cohen and Elkin. The mails were used in execution and furtherance of that scheme. Epstein, the petitioner, had neither knowledge of that scheme, nor of the letters sent in furtherance thereof. The letters were sent on stolen letterheads of the Treasury Department; were mailed in official envelopes of the Treasury Department, which were also stolen; and bore the forged signature of a Treasury Department official.

The Epstein, Sussman and Cohen Scheme:

The petitioner was a substantial businessman with a good reputation (R. 322). He was in the hotel business in New York City and was successful (R. 267). He had at the request of Harry Sussman, an acquaintance of many years (R. 270), made advances to Wilfred E. Cohen whom he had not yet met, upon post-dated checks (R. 18-19). For those advances he received a fee of 1% a day; the total advances amounted to $10,000 and covered a period of two months prior to the meeting with Cohen on or about January 1, 1942 (R. 20-21).

Wilfred E. Cohen had been in the interior decorating business from 1932 through 1940 (R. 15-16). In 1928 he had pleaded guilty to forgery (R. 15), but the record does not show whether the petitioner knew it. In November, 1940 he organized Spotlight Productions, Inc. (R. 16) in which he had invested $50,000 (R. 208). The Corporation engaged in the manufacture of coin-operated

motion picture projection machines (R. 16-17), and in the production of short movies for use with those machines (R. 208).

At or about January 1, 1942, Epstein met Cohen; the meeting had been arranged by Sussman and he was present (R. 18; 23; 210). The meeting was held at the offices of Spotlight Productions, Inc. at 723 Seventh Avenue, New York City (R. 17-18). Spotlight occupied the whole top floor of the building. There was a projection room, a private office and two other rooms, all well furnished (R. 213). Cohen told the petitioner that he had the factory at 313 East 22nd Street, also in New York City (R. 214). One of the projection machines was on display and Cohen showed him how it worked and demonstrated it by running off some short movies lasting about an hour (R. 22). He told Epstein that he had sold a number of the machines; that he was compelled to take some back because of certain defects and that he was working on a new type of machine which would cure the defects (R. 22; 213-214). He also told Epstein that he had, at the factory, two hundred completed machines selling for $685 each and about one hundred machines in process worth about $150 each (R. 214), or a total of about $152,000.

Sussman had been lending money to Cohen and the meeting at Cohen's office had been arranged by Sussman in order to induce Epstein to make a loan of about $10,000 to Cohen (R. 212).

Epstein, Sussman and Cohen met again on January 20th at the new Union Square Hotel, also in New York City. That meeting also was arranged by Sussman (R. 23) and prior to the meeting, Epstein had agreed to make four notes aggregating $11,700. The notes were made payable to the order of Sussman and Sussman endorsed

them and delivered them to Cohen (R. 23; Ex. 4, R. 470). For the making of the notes, and for endorsing them, Epstein and Sussman each received about $400 (R. 27). It was understood that Cohen would discount those notes with money lenders and Epstein and Sussman both agreed that they would, if asked, state that the notes were issued, in payment for machines and that they would if requested sign estoppel certificates to that effect (R. 25).

At this meeting of January 20, Epstein demanded security for the notes and there was issued to him a conditional bill of sale. Epstein, however, made it clear that in making the notes, he relied mainly upon the guaranty of Harry Sussman (R. 23, 216, 217, 220).

Two of the notes which were issued on January 20th matured on April 20th and two on May 20th (R. 28). The notes which became due on April 20th were paid with funds furnished by Cohen (R. 29). On May 15th, five days before the other two notes became due, the petitioner, Cohen and Sussman met again; that meeting also was arranged by Sussman. Prior to the meeting Epstein had agreed, apparently at the request of Sussman, to issue new notes which would be discounted, and with the proceeds the May 20th notes would be paid (R. 30). Thereafter from time to time Epstein issued more notes and signed more estoppel certificates. The notes and the estoppel certificates were delivered to various money lenders, who discounted the notes. For making the notes, Epstein received a fee. He did not share in the proceeds.

Sussman had been cashing post-dated checks for Cohen and there came a time when the bank upon which Cohen's check had been drawn objected to this check "kiting" (R. 78-79). For a fee Epstein agreed to "kite" checks with Cohen. Some of the checks issued by Epstein were

cashed with money lenders; the remainder were cashed with Grand Central Trading Company (R. 79), which was owned and operated by Sussman (R. 78). Of course Sussman participated in this arrangement.

This issuing of checks and notes continued from January, 1942 through the greater part of 1943. Until September, 1943, for a year and a half, Cohen paid every note and check that had matured (R. 176, 244, 247).

In October, 1943, the triumvirate found themselves in financial difficulties and Sussman and Epstein agreed that they would each advance $10,000 (R. 199). Epstein advanced his $10,000, but Sussman did not and in fact never intended to do so (R. 199, 252-3). In November, Epstein and Sussman each agreed to advance an additional $7,000 (R. 200-201). Epstein had been told by Cohen and Sussman that Sussman had advanced the $7,000 which he had promised to advance in October. Believing the representations and relying upon the promise of Sussman that he would advance an additional $7,000, Epstein advanced $7,000 to Cohen. Sussman never did and never intended to do so (R. 253-257).

The total fees received by Epstein for notes and checks issued by him was $24,000 (R. 242-243). The $17,000 which he had advanced was never repaid to him and later he made a settlement with his creditors for $15,000 (R. 268). The net result of these transactions was a loss of some $7,000 to Epstein.

The indictment (R. 2, *et seq.*) does not charge that the mails were used in furtherance of or in execution of the sale or discounting of any notes or checks made, signed or endorsed by the petitioner Epstein.

The Cohen-Elkin Scheme:

Even prior to his meeting with Epstein, Cohen had been selling his own and Sussman's checks to Lectern Service, a corporation engaged in the money lending business (R. 72-73). Lectern bought some of Epstein's notes from Cohen and in connection with these transactions Cohen met the defendant Sam Elkin (R. 74), Lectern's manager (R. 319).

Elkin and Cohen devised the second scheme; in fact Elkin originated it (R. 155).

That scheme was practised upon two money lenders; Lectern Service, the firm of which Elkin was manager, and Accurate Factors. Lectern had refused to accept any more Epstein notes (R. 415) and Accurate had limited the amount of Epstein notes which it would at any one time discount, to $5,000 (R. 372).

It was because Lectern and Accurate would not accept Epstein notes that this Cohen-Elkin scheme was devised. It was in furtherance of that scheme that the mails were used.

The first victim of this Cohen-Elkin scheme was Elkin's firm Lectern Service, Inc. In November, 1942, Elkin introduced Cohen to Morris Popkin who had just become associated with the firm as treasurer (R. 329). Cohen stated to Popkin that he had leased a number of motion picture projection machines to the Treasury Department for use in connection with the sale of war stamps and war bonds; that payment was not expected for some time; and that he needed money for his business and asked for an advance against the alleged Government debt (R. 413-415, 416).

Popkin wanted proof. And Cohen, with the aid and assistance of Elkin, furnished it.

In some way which the record does not explain, Cohen had procured some official letterheads and envelopes of the Treasury Department. And Elkin and he—in fact it was Elkin—composed a letter and sent it by mail on the official letterhead of the Treasury Department in a franked envelope of the Treasury Department bearing the forged signature of a Treasury official (R. 155). This spurious forged letter confirmed the lease and acknowledged the indebtedness to Cohen, and in reliance thereon, Lectern made the first advance to Cohen in December, 1942 (R. 155, 417). The advance was made upon the note of Spotlight Productions, Inc., endorsed by Cohen, and secured by an assignment of the alleged debt due from the Government (R. 154, 156).

A number of such advances were made by Lectern Service to Cohen upon the notes of Spotlight Productions, Inc., endorsed by Cohen and secured by an assignment of the alleged monies due from the Government, from December, 1942 through the greater part of 1943. The letters were addressed to Spotlight Productions, Inc., 277 Broadway, the address of Lectern Service (R. 417; Exs. 36, 37, R. 474). And each advance was made in reliance upon letters sent on stolen letterheads and in stolen envelopes of the Treasury Department bearing the forged signature of a Treasury official.

The first transaction with Accurate Factors relating to alleged Treasury obligations occurred in February, 1943 (Ex. 31, R. 457). Cohen also told Accurate that he had leased a number of machines to the Treasury Department for use in connection with the sale of war stamps and war bonds and upon request for proof of such transactions, furnished it by mailing letters on stolen official Treasury letterheads, enclosed in stolen franked official envelopes and bearing the forged signature of a Treasury official. Just as in the case of Lectern, Accurate

made the advances on the notes of Spotlight Productions, Inc., endorsed by Cohen and "nobody else" (R. 377) and secured by an assignment of this supposed Government debt (R. 376-378).

From February, 1943, through August, 1943, Accurate advanced upon the notes of Spotlight, endorsed by Cohen and secured by assignments $162,000, of which only $70,000 was repaid (R. 389; Exs. 31, 32, 33, 34, 35; R. 457-461).

And the undisputed and uncontradicted testimony was that Epstein was never told and never knew about this Cohen-Elkin Treasury scheme.

In summarizing that testimony, the District Court said (R. 430):

> "The Court: The testimony of Cohen is that he never discussed Treasury income with Epstein in any way, I was rather careful to note. * * *"

Epstein did not know Elkin; they had never met (R. 280-281).

Specifications of Error

The Court below erred:

1. In holding that the petitioner used the mails to defraud in violation of Section 215 of the Criminal Code, 18 U. S. C. A. Section 338.

2. In failing to hold that the letters set forth in the indictment were used to further and execute an entirely separate distinct and independent scheme with which the petitioner was not connected and to which he was not a party.

3. In affirming the judgment of conviction of the District Court.

Reasons for Granting the Writ

The petitioner was convicted of using the mails to defraud in violation of Section 215 of the Criminal Code, 18 U. S. C. A. 338 upon evidence which clearly establishes that no such use of the mails was made.

In *Kann* v. *United States,* 323 U. S. 88, this Court said at page 95, "* * * The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law."

The letters which were mailed as charged in the indictment, were used in furtherance of and in execution of a separate, distinct and independent scheme with which the petitioner was not connected, of which he had no knowledge, and to which he was not a party. In describing the scheme to which the petitioner was a party, the Circuit Court of Appeals in part said as follows (R. 485):

> "In detail, the scheme called for defendant Epstein to make promissory notes to Sussman, which were then to be endorsed to Cohen and by the latter discounted with various factors throughout the city. To induce such discounting, Cohen was to represent that the notes were received for the purchase price of machines bought from Spotlight by Epstein and Sussman, who agreed to corroborate the story if questioned and to execute the notes and supporting documents, receiving, in turn, a consideration of $400 for each $10,000 of notes issued. * * *"

One of the purposes of the petitioner in entering into this scheme was to make a profit. He derived no profit

whatever from the notes which were discounted in reliance upon the suppositious Treasury debt. It was because Lectern Service and Accurate Factors refused to discount notes of the petitioner that the new scheme was devised by Cohen and Elkin. The new scheme had for its purpose not the discount of paper to which the petitioner was a party, but the discount of paper to which he was not a party and from which he derived no profit. The petitioner was not a confederate to this new scheme. *United States* v. *Cohen,* 145 F. (2d) 82, (2 C. C. A., 1944); *United States* v. *Crimmins,* 123 F. (2d) 271 (2 C. C. A. 1941).

If the letters, which were sent on stolen Treasury letterheads in stolen official envelopes, signed with the forged signature of a Treasury official, are within the scope of the scheme devised by Cohen, Sussman and Epstein for the sale and discount of notes and checks made or endorsed by Epstein, then the theft of the letterheads and the envelopes and the commission of forgery must also be held within the scope of that scheme and the petitioner was guilty not only of using the mails to defraud, but he was guilty also of larceny in violation of Section 35C of the Criminal Code, 18 U. S. C. A. 82; of using franked envelopes in violation of Section 227 of the criminal Code, 18 U. S. C. A. 357; and of forgery. *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229; *Van Riper* v. *United States,* 13 F. (2d) 961, 967 (2 C. C. A., 1926); *Morei* v. *United States,* 127 F. (2d) 827 (6 C. C. A., 1942).

Surely it was never within the contemplation of Epstein when he became a party to the scheme to issue his notes and checks for discount with money lenders, that Cohen in collusion and conspiracy with Elkin, a third person unknown to him, would steal and use official sta-

tionery and envelopes of the Treasury Department and forge the signature of a Treasury Department official.

The petitioner was not guilty of any offense cognizable under the laws of the United States.

CONCLUSION

Wherefore, it is respectfully submitted that, for the reasons herein stated, a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Second Circuit should be granted.

Dated: New York, April 18, 1946.

Louis Epstein,

By David M. Palley,
Counsel for Petitioner.

Hyman Grill,
of Counsel.

APPENDIX

Statutes Involved

Section 215 of the Criminal Code (18 U. S. C. A., Section 338)

"**Using mails to promote frauds; counterfeit money.** Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute supply, or furnish or procure for unlawful use any counterfeit or spurious coin, bank note, paper money, or any obligation or security of the United States, or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the 'sawdust swindle', or 'counterfeit-money fraud', or by dealing or pretending to deal in what is commonly called 'green articles', 'green coin', 'green goods', 'bills', 'paper goods', 'spurious Treasury notes', 'United States goods', 'green cigars', or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other let-

ter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both."

No. 1149

In the Supreme Court of the United States

OCTOBER TERM, 1945

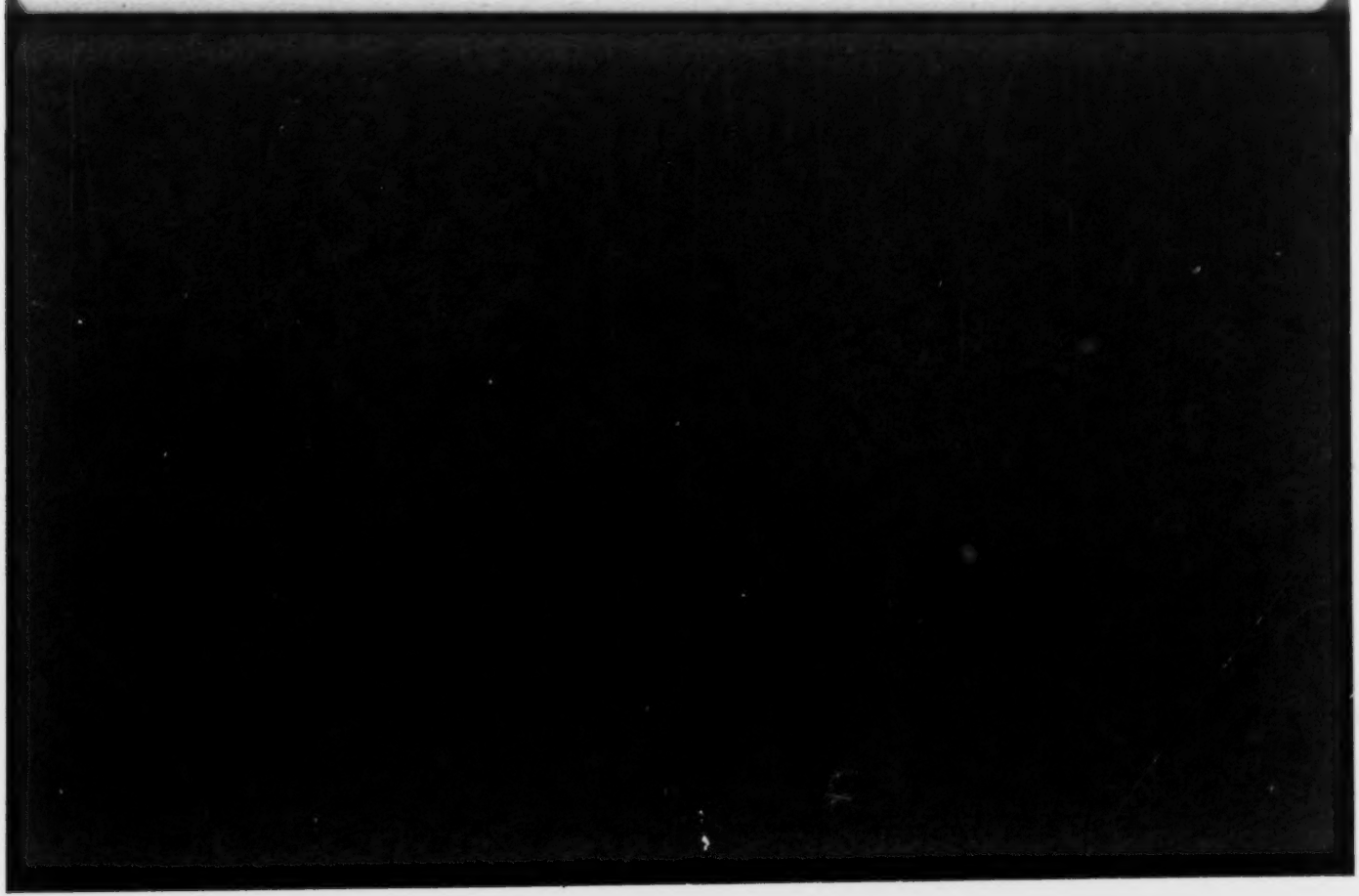
LOUIS BRANDY, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION



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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 483–490) has not yet been reported. The opinion of the district court denying petitioner's motion to dismiss at the close of the Government's case appears at pages 439–445 of the record.

JURISDICTION

The judgment of the circuit court of appeals was entered March 26, 1946 (R. 491). The petition for a writ of certiorari was filed April 23, 1946. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

QUESTION PRESENTED

Whether the evidence is sufficient to establish that the mailings charged in the indictment were in execution of the scheme to defraud in which petitioner was associated.

STATUTE INVOLVED

Section 215 of the Criminal Code (18 U. S. C. 338) provides in pertinent part as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to

> be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

An indictment in six counts was returned against petitioner and three others in the District Court for the Southern District of New York, charging use of the mails in execution of a scheme to defraud various factors by the kiting of checks, securing the discounting of notes falsely alleged to represent the purchase price of motion picture equipment, and false representations respecting purported contracts for the sale of motion picture machines to the United States Government (R. 2–13). Petitioner waived a jury trial and was tried alone (R. 17). He was convicted on five of the six counts,[1] and sentenced to imprisonment for one year and one day on each, the sentences to run concurrently (R. 463). On appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was affirmed (R. 491).

The evidence for the Government may be summarized as follows:

[1] The second count was dismissed on the Government's motion (R. 431).

Wilfred Cohen, one of the defendants named in the indictment, had been borrowing money from another defendant, Sussman, paying him interest at the rate of six percent per week (R. 19–22). In January 1942, Sussman introduced petitioner to Cohen, stating that petitioner was the man from whom he had obtained some of the money he had loaned Cohen (R. 18). Cohen showed petitioner a motion picture machine owned by Spotlight Productions, Inc., a corporation owned by Cohen (R. 16, 22).

Subsequently, petitioner, Cohen, and Sussman met to discuss the form of loans to Cohen (R. 23). Cohen told petitioner that he could not discount notes made by petitioner and Sussman with factors unless he could produce evidence of the purpose for which the notes were taken (R. 24, 25). Petitioner suggested chattel mortgages on motion picture machines as security for the notes, but Cohen convinced him that conditional bills of sale would be more feasible (R. 216–217). Petitioner agreed that, if an investigation were made, he would state that he had purchased machines from Cohen (R. 25).

Thereafter, petitioner and Sussman executed promissory notes to Cohen's order and also signed fictitious purchase orders for motion picture equipment, conditional bills of sale, and estoppel certificates stating that the notes were genuine and incontestable (R. 25–27). Cohen discounted

these notes with various factors (R. 28). He agreed to pay petitioner and Sussman $400 each per $10,000 worth of notes used (R. 27–28).

In May 1942, Cohen arranged for a similar group of loans through petitioner and Sussman by the same device of notes for fictitious sales of motion picture equipment (R. 30–32). Cohen told petitioner that he intended to use the proceeds of these notes to pay off the notes previously signed by petitioner and Sussman (R. 30). Petitioner suggested to Cohen a factor who might be willing to discount notes at a lower rate than Cohen was paying (R. 31).

This process was constantly repeated for the next sixteen months, the amount of the notes increasing each time (R. 58–59, 60–61, 63–64, 66–68, 71–72, 74–75, 77, 94–104, 113–114, 354). After August 1942, conditional bills of sale were not used, but estoppel certificates were signed (R. 107, 116–118, 120–121, 130, 132–136, 138, 159, 162–164, 167–168). Still later, at Cohen's request, the form of the notes was changed to have a corporation dominated by Sussman as maker and Sussman and petitioner as endorsers, or Spotlight Productions as maker and Sussman and petitioner as endorsers (R. 171–172, 173–175, 178). In all, the notes signed or endorsed by petitioner and Sussman totaled $700,000, of which $127,790 remained unpaid in December 1943 (R. 346).

In some instances factors had their own forms of estoppel certificates and, when Cohen so informed petitioner and Sussman, they executed such forms (R. 51–54). At Cohen's request, petitioner mailed such an estoppel certificate to a factor (R. 64–65).

During the period that the notes were being discounted, Cohen also arranged with petitioner to use a bank account of petitioner's corporation, the New Union Square Hotel Corporation, for the purpose of "kiting" checks. Cohen at first paid petitioner $50 for each $5,000 worth of checks drawn. Subsequently, he paid petitioner $100 per week, and later $150 per week for the use of the account. (R. 78–89, 90–92, 122–131, 137, 143–144, 188–189, 267.)

In November 1942, Lectern Service, which had been discounting notes signed by petitioner and Sussman on Cohen's representations that the notes were given for the purchase of machinery (R. 321–323), and which then held obligations amounting to approximately $25,000 in the form of notes, Union Square Hotel Corporation checks, and Cohen checks (R. 415–416), refused to discount further obligations of this character (R. 415). Accurate Factors, another company which had been discounting notes signed by petitioner and Sussman in the belief that they represented the purchase price of machinery (R. 371), had fixed $5,000 as the maximum amount of such

notes which it would discount (R. 372). In January and February 1943, Cohen told these factors that he would give them assignments of money allegedly due him from the Treasury Department of the United States for motion picture equipment sold in connection with war bond sales. He produced false invoices of sales from Spotlight Productions to the Treasury Department and forged letters of confirmation on official stationery of the Treasury Department. (R. 147–154, 386–387.) He stated that the Treasury Department was to make payment through the American Railway Express upon the delivery of machines to the express company, and he displayed to the factors express company checks procured by sending "dummy" packages by express c. o. d. and paying therefor at the point of delivery (R. 392–394, 399). The "count letters" were all forged Treasury confirmations mailed by Cohen to Spotlight Productions (count 1, Ex. 31, R. 149–150, 457; count 3, Ex. 32, R. 150–151, 458; count 4, Ex. 33, R. 152, 459; count 5, Ex. 34, R. 152, 460; count 6, Ex. 35, R. 152, 461). On the basis of the fictitious assignments of money due from the Treasury, both Accurate Factors and Lectern Service continued to lend considerable sums of money to Cohen during 1943 (R. 148, 154, 156–158).

During the period that Cohen was obtaining money on forged Treasury confirmations, he con-

tinued to discount notes endorsed by petitioner and Sussman (R. 159, 162, 163–164, 167–168, 170–171, 178, 180–181, 384, 387). Such notes were accepted during this period by both Accurate Factors and Lectern Service, the two factors who were taking the fictitious assignments of Treasury obligations (R. 384–385, 418–420).

In August 1943, Cohen told petitioner that some of the notes petitioner had endorsed would not be paid (R. 195). Petitioner at first stopped payment on the specific notes which Cohen told him would be defaulted. Subsequently he stopped payment on all except those Cohen said he would pay off. (R. 277–278.) Petitioner told an official of his bank that he was stopping payment on one of the notes because he expected new machines (R. 334–335). He had previously told this official that he was interested in the motion picture business (R. 336). In October 1943, petitioner loaned Cohen $10,000, receiving in exchange post dated checks for $16,000 (R. 198–199). Later, petitioner gave Cohen $7,000 which was to be repaid at the same ratio of 8 to 5 (R. 200).

Some time in November 1943, Cohen told petitioner and Sussman that if he did not raise $100,000 there would be trouble (R. 202, 204); that there was "a criminal angle," because of "these phoney bills and everything" (R. 204). He also said that a post office inspector had been

trying to reach him (R. 204). Sussman stated that he had not personally mailed "the letters," and petitioner remained silent (R. 204–205).

Cohen testified that during the period up to October 1943, he had not told petitioner that he had any business dealings with the Treasury or that he was obtaining money on the basis of false Treasury letters (R. 155, 433–434).

ARGUMENT

Petitioner urges (Pet. 2, 9–12) that, in view of Cohen's testimony that he did not inform petitioner of the fraudulent Treasury letters, the evidence is insufficient to support petitioner's conviction for the mailing of the forged Treasury letters charged in the indictment. This contention was carefully considered and rejected by both the district court (R. 443–445) and the circuit court of appeals (R. 486–489) on the ground that the Treasury letters were merely part of a general scheme contemplating the use of the mails to which petitioner was a knowing party.

We submit that the decisions below are correct. It is a well established principle of mail fraud law that one who becomes a party to a scheme to defraud which may reasonably be anticipated to involve the use of the mails is liable for mailings performed or caused by his confederate in execution of the scheme, even though he may not have been aware of the specific use of the mails

which forms the basis of the indictment. *Kann* v. *United States,* 323 U. S. 88, 93; *United States* v. *Cohen,* 145 F. 2d 82, 90 (C. C. A. 2), certiorari denied, 323 U. S. 799; *Clarke* v. *United States,* 132 F. 2d 538, 540 (C. C. A. 9), certiorari denied, 318 U. S. 789; *Spivey* v. *United States,* 109 F. 2d 181, 184 (C. C. A. 5), certiorari denied, 310 U. S. 631; *Shreve* v. *United States,* 103 F. 2d 796, 813 (C. C. A. 9), certiorari denied, 308 U. S. 570; *Hallowell* v. *United States,* 253 Fed. 865, 868 (C. C. A. 9), certiorari denied, 249 U. S. 615.

There can be no question that, in this case, petitioner was a party to a scheme which contemplated the use of the mails, for he himself agreed to and did send through the mails an estoppel certificate required by one of the factors (p. 6, *supra*). The only issue before the trial court on this aspect of the case, therefore, was whether petitioner joined a scheme limited to the particular transactions in which he directly participated, or whether he was a party to the general scheme to defraud charged in the indictment. We think that on the evidence the courts below were warranted in finding that petitioner had so tied himself to Cohen's plans and that the false Treasury assignments were so integral a part of the scheme in which petitioner had associated himself that he must be considered *particeps criminis* as to all phases of the scheme.

Petitioner's willingness to do whatever Cohen suggested in order to further the fiction that Cohen was an active, successful businessman is apparent. He deferred to Cohen's request that the notes to be discounted be supported by fictitious bills of sale rather than chattel mortgages. He allowed Cohen to use his corporate checking account to "kite" checks in any amount. He signed any form of estoppel certificate which was presented to him. When Cohen decided that corporate notes with petitioner and Sussman as endorsers were better than notes with petitioner and Sussman as makers, petitioner acceded without question to Cohen's request for a change of form.

Furthermore, the success of the Treasury assignment aspect of the scheme was made possible by the fact that the prior fictitious sales to petitioner and Sussman had given Cohen's transactions the appearance of business activity. At the same time, the money secured by assigning the fraudulent Treasury obligations enabled Cohen to continue operations and made possible further issuance and discount of notes endorsed by petitioner and Sussman during the same period. In one instance, Cohen used $25,000 in notes signed by petitioner to redeem fictitious Treasury obligations on which payment was allegedly delayed by the Federal Government (R. 419–421). The Treasury obligations were thus part of Cohen's whole scheme of financial juggling, a scheme which peti-

tioner had knowingly joined and in which he had actively participated. Considered in narrower compass, the Treasury obligations were a device to prevent discovery and to permit continued operation of the particular scheme with which petitioner was unquestionably associated, the scheme to keep Cohen in a financial position to use petitioner's endorsements on notes for a price. Under the circumstances, therefore, petitioner was properly held liable for the mailings charged in the indictment.

CONCLUSION

The decision below involves merely the application of well established principles of law to the particular facts of this case, and presents no question requiring further review by this Court. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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